In The

Supreme Court of the United States

October Term, 1971

Supreme Court, U. S.
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No. 71-948

Columbia Broadcasting System, Inc.,
Petitioner,
v.
Democratic National Committee, *et al.*,
Respondents.

No. 71-964

Federal Communications Commission and United States of America,
Petitioners,
v.
Business Executives' Move For Vietnam Peace, *et al.*,
Respondents.

No. 71-965

Post-Newsweek Stations, Capital Area, Inc.,
Petitioner,
v.
Business Executives' Move For Vietnam Peace, *et al.*,
Respondents.

No. 71-966

American Broadcasting Companies, Inc.,
Petitioner,
v.
Democratic National Committee, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents,

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

OPINIONS BELOW

The opinion of the court of appeals (App. 446) is reported at 450 F.2d 642 (1971). The *Memorandum Opinion and Order* of the Federal Communications Commission in *Democratic National Committee* (App. 247) is reported at 25 F.C.C. 2d 216 (1970). The Commission's letter decision in *Business Executives' Move for Vietnam Peace* (App. 357) is reported at 25 F.C.C. 2d 242 (1970).

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1971 (App. 492). Petitions for rehearing were denied by an order of the court of appeals (App. 494) entered on October 4, 1971. Petitions for certiorari were filed on January 3, 1972, granted by this Court

on February 28, 1972, and a contemporaneous order of consolidation thereby entered. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution and Sections 3(h), 315(a) and 326 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 153(h), 315(a) and 326.

The First Amendment to the Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 3(h) of the Communications Act of 1934, 48 Stat. 1065, *et seq.*, as amended, 47 U.S.C. 153(h), provides:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. 315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided,

that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Section 326 of the Communications Act of 1934, 48 Stat. 1091, as amended, 47 U.S.C. 326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

QUESTION PRESENTED

Pursuant to the regulatory system established by the Communications Act of 1934, as amended, and administrative rules and policies formulated by the Federal Communications Commission, broadcast licensees are under a specific obligation to provide full and fair coverage of diverse viewpoints on controversial public issues. The question presented is whether, notwithstanding the foregoing obligation explicitly imposed by Congress and the Commission, the First Amendment additionally compels all broadcast stations to sell advertising time to individuals or groups for brief "spot" announcements asserting their particular views.

STATEMENT OF THE CASE

In these consolidated cases, this Court is asked to review a decision of the United States Court of Appeals for the District of Columbia Circuit holding that the First Amendment dictates that broadcasters be required —pursuant to a set of regulations to be devised by the Federal Communications Commission [1]—to sell advertising time for the presentation of individualized views on public issues. This ruling flatly overturned two separate opinions of the Commission which had found that broadcast licensees, who are required by the Commission's "fairness doctrine" to originate programs involving controversial issues of public importance, are not also required to sell time to individuals and groups for the advertising of their particular views. *Democratic National Committee*, 25 F.C.C. 2d 216 (1970);[2] *Business Executives' Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970).[3]

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[1] Hereinafter the "Commission" or the "FCC".

[2] App. 247.

[3] App. 357.

Petitioner American Broadcasting Companies, Inc. (hereinafter "ABC") participated in the *Democratic National Committee* case before the Commission and intervened in support of the Commission and the United States of America when the matter reached the court of appeals.

ABC, itself or through its subsidiaries, is the licensee of a number of radio and television stations and operates radio and television networks. In this capacity, both through the ownership of individual stations and the operation of broadcast networks, providing program material to hundreds of affiliated stations, ABC is a source for the production and transmission of significant amounts of news and public affairs broadcasts on a wide and ever-changing variety of public issues.

A. Agency Proceedings

The *Democratic National Committee* case [4] originated with a request by the Democratic National Committee (hereinafter "DNC") that the Commission issue a declaratory ruling that, as a general matter, broadcast licensees are required to sell broadcast time to "responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [5] Framed in this fashion, the DNC petition contained no assertions that any particular broadcast licensee either had failed to provide fair and full coverage of important public issues, or had refused to sell time for comment on controversial public issues. Indeed, the request contemplated that not-

[4] As noted, ABC was a party below only to the *Democratic National Committee* (Case No. 24,537 in the court of appeals) proceeding. Accordingly, in this Statement we concentrate on the *DNC* case and, for the most part, rely on the briefs of the Government and Post-Newsweek, Capitol Area, Inc. for a description of the agency proceedings in the companion *Business Executives' Move for Vietnam Peace* case (Case No. 24,492 below).

[5] App. 247.

withstanding such coverage or any individual offers of paid time for controversial issue comment, a general obligation remained as to all broadcasters to sell time to DNC and similar groups to present their viewpoints.[6]

Since the relief requested was partially premised on what DNC viewed as the restrictive nature of then existing policies of the three national television networks, the Commission solicited comments from the network companies.[7] ABC's response[8] set forth a number of internal policy standards which, *inter alia*, recognize an abiding responsibility to utilize the broadcast facilities under its direction in a manner which both safeguards and promotes the opportunity for the full exposure of representative views and controversial issues of general concern to the American people.[9] However, in a concomitant recognition of the public interest detriments and practical impediments associated with a universal and absolute right by *any* "responsible entity" to purchase time to espouse a point of view or solicit funds, ABC advised the Commission that it proposed to continue to adhere to its general approach of not selling time for controversial issue programs and announcements[10] and solicitation for funds, absent special public

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[6] App. 260.

[7] App. 35.

[8] App. 42.

[9] Such views and issues are presented in a variety of program formats which not only affirmatively allow for the exposure of partisan spokesmen and their views, but enable the presentation of such persons and groups on a free time basis—i.e., even in instances where the program may be wholly or partially sponsored, public issue spokesmen appearing thereon do not purchase this exposure.

[10] As the record reflects, ABC sells advertising time during both election and non-election periods to the major political parties for the solicitation of funds and for expression of views on public issues. In addition, during election campaigns, ABC sells

interest considerations. ABC did indicate, however, that although it was opposed to any ruling which would require the sale of time to *all* "responsible entities," it was prepared to accept—consistent with its policy of taking into account special public interest considerations—such orders for time from major political parties as could reasonably be accommodated.[11]

The ensuing Commission decision held that broadcasters must make time available "to significant political parties for the solicitation of funds" [12] but that important statutory and policy considerations militated against granting DNC or any other particular individual or group an absolute right of access to broadcast time for the purpose of commenting on controversial issues of public importance.[13]

The Commission emphasized that although under prevailing policies a licensee was by no means precluded

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advertising time to political parties, political candidates and their supporters, and to various spokesmen on public issues which are on the ballot.

[11] App. 46.

[12] The Commission found that the policies of three major networks (ABC, Columbia Broadcasting System, Inc. and the National Broadcasting Company, Inc.) were consistent with that portion of its holding. (App. 269).

[13] In a separate action on the same day, the Commission decided the companion case herein, *Business Executives' Move for Vietnam Peace* ("BEM") (App. 357). There, the Commission rejected the complaint of an anti-war group against Washington, D.C. Radio Station WTOP which had refused to sell spot advertising time to present that group's views on the Vietnam war. As in the *DNC* case, the central contention in the *BEM* proceeding was that the First Amendment required WTOP to sell BEM time for the presentation of its individual views, even though the station had fully complied with its fairness doctrine obligations with respect to the exposition of significant contrasting views on the Vietnam War issue. In its decision, the Commission found that the fairness doctrine had not been violated and, relying on its contemporaneous *DNC* decision, that the First Amendment did not require WTOP to sell advertising time to BEM to present its views (App. 368).

from selling time for controversial issue discussion, consistent with his fairness doctrine responsibilities, there were more compelling considerations that dictated the Commission's refusal to hold that a licensee is unyieldingly bound to sell time to particular persons or groups for the discussion of public issues over and above the exercise of his fairness doctrine responsibilities. A central element in weaving this conclusion was the Commission's recognition that the regulatory framework sanctioned by Congress in the Communications Act of 1934, as amended, deliberately avoided placing broadcasting in a "common carrier" mold. Thus, in contrast to common carriage, which is public in its availability but essentially private and passive in its communications function, broadcasting exists to simultaneously and indiscriminately communicate to the public at large.

As the Commission observed, this was the very role endorsed by this Court in *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367 (1969)—a role which contemplates that broadcast licensees will perform in a "fiduciary" capacity for the entire public they serve. In this context, the Commission noted that in *Red Lion*, this Court had characterized the broadcaster's task as being oriented to the presentation of "representative community views on controversial issues." [14] This undertaking does not, however, comprehend the further dimension embodied in the DNC petition, that there is an obligation to sell time for the presentation of individual views which transcends the fairness doctrine right of the public to be informed. As the Commission remarked, a determination of this sort would entail a substantial reordering of the fairness doctrine and a direct assault upon the touchstone of broadcast regulation—i.e., the concept

[14] The Commission also pointedly emphasized that the obligation to present "representative views" was clearly intended to include views not held by the licensee and views expressed by non-station "partisan voices" (App. 259).

set in motion by Congress, and more recently sustained by this Court in *Red Lion*, that the public interest obligation of broadcasters is to devote a reasonable amount of time to issues of public importance and to do so in a fair manner. To *require* broadcast licensees to sell time for these purposes would mean that "the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent"—i.e., by those persons and organizations who have ". . . the financial resources and interest to purchase sustained access to the mass communications media. . . ." [15]

The Commission's decision, it must be emphasized, was not unmindful of the critical First Amendment interests at stake. However, unlike the court of appeals, the Commission reasoned that the *public's* First Amendment rights are better protected by the traditional regulatory scheme.[16] Accordingly, the Commission concluded that the present system of regarding licensees as "trustees" with an affirmative duty to present contrasting viewpoints through representative spokesmen, was of greater public benefit than—and could not reasonably co-exist with—a regulatory standard based on an individualized right of access.

Finally, the Commission addressed the position of dissenting Commissioner Johnson that the operation of a broadcast station is analogous to the administration of public facilities such as parks and municipal transit systems, and that once such a facility is utilized for some speech purposes the First Amendment requires that access be granted on the same basis to all potential customers.[17] In the Commission's view, the dissent failed to adequately assess the limited availability of radio

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[15] App. 263.

[16] App. 263-64.

[17] App. 266.

time and the obligation imposed upon broadcasters, but not upon other media, to fully and fairly inform the public on all significant positions involving controversial issues. The Commission also found the approach posited by the dissent to ignore or to blithely treat substantial practical as well as conceptual problems.[18]

B. The Court of Appeals Decision

Upon petitions for review of both the *DNC* and *BEM* decisions, a divided court of appeals reversed the separate decisions of the Commission—holding that, despite Congressional or agency policy to the contrary, the First Amendment requires broadcast licensees who sell time for spot advertisements for commercial products and services to make such advertising time[19] available to individuals and groups wishing to present their particular views on controversial issue subject matter.

The court determined that action by broadcast licensees constituted "state action" through the following syllogism. First, it found that broadcasting was undoubtedly a suitable medium for the communication of ideas. Secondly, since broadcast stations are "fiduciaries" of the public and operate only pursuant to a government license, the court found the broadcast business to have a public character. Finally, as to the specific cases on appeal, the court determined that there had been "approval of or acquiescense in" the challenged actions of the broadcasters by the Commission.[20]

Pursuant to the majority opinion, the newly articulated Constitutional right to purchase spot announcements for public issue discussion would obtain regardless of whether

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[18] App. 268-69.

[19] The court of appeals first drew a specific contrast with and thereby exempted from its ruling what was termed regular programming time. (App. 464).

[20] App. 461.

the licensee in question was in full compliance with the Commission's fairness doctrine. Indeed, the right could be invoked even in circumstances where the issue and precise viewpoint the individual or organization seeks to address has been specifically covered in prior broadcasts.[21] The court brushed aside contentions of the Commission and broadcasters that the agenda for public issue discussion would increasingly be established at the whim of those persons and organizations having the ready resources to gain exposure of their individual viewpoints.

The court of appeals was unpersuaded that issue discussion in this segment of broadcast time would be unduly influenced by those persons and groups having the financial wherewithal to purchase media access and that, in the process (1) licensees would face diminished control over program content and schedules and (2) the prevailing fairness doctrine principle that contrasting views be presented free of charge if sponsorship is unavailable[22] could, when applied to this form of editorial announcement, impair the broadcast industry's financial base. The court simply remanded the cases to the Commission for the purpose of developing "reasonable regulatory guidelines" to somehow accommodate these and other factors.[23]

Although the court suggested that stations could establish a quantitative limit on such "editorial advertising" and could regulate the placement of such advertisements within reasonable limits, clearly the licensee could not "exercise the same 'authoritative selection' in editorial advertising which he exercises in normal programming."[24] Furthermore, that the licensee would not be allowed to exercise his traditional journalistic role is

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[21] App. 469, 473.

[22] First stated in *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963).

[23] App. 449, 488.

[24] App. 485.

emphasized in the court's assertion that a request to purchase time cannot be rejected for the reason that the viewpoint a person or group may wish to present has been repeatedly broadcast in the past.[25] Similar restrictions appear to exist in terms of the ability to reject such advertising time on the basis that the content has either a marginal level of public interest or is in some respects offensive or inappropriate.[26]

In a dissenting opinion, Judge McGowan characterized the Commission's task on remand as one of "heroic proportions", the complexity of which might undermine the basic premise on which it was founded. In Judge McGowan's view, the newly established First Amendment right announced by the majority could interfere and frustrate the right—so essential to this Court's prior ruling in *Red Lion*—of the public to be fully informed. The private licensee system of broadcasting provided by Congress, operating under "the obligation . . . to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance," has proven to be an effective mechanism for implementing the desired public policy.[27] To now disregard this regulatory scheme for a new "system in which money alone determines what issues are to be aired" would, Judge McGowan concluded, represent an unwise and unnecessary course.[28]

Petitions for rehearing to the court below were denied.[29] This Court granted the several petitions for certiorari on February 28, 1972 and entered a stay of the mandate of the court of appeals.

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[25] App. 470-72.

[26] App. 469, 471-73, 477, 485.

[27] App. 490.

[28] *Ibid.*

[29] App. 495.

SUMMARY OF ARGUMENT

The decision of the court below is erroneously premised on a finding that the existing system of broadcast regulation, formulated and periodically recast by Congress and regularly administered by the Commission, is constitutionally deficient. Proceeding from this assumption, the lower court directed the Commission to establish guidelines to govern a new-found constitutional requirement that broadcast stations sell advertising time to individuals and groups for partisan "spot announcements" on public issues. While the lower court reiterated that it was asserting a limited right, the unequivocal constitutional basis therefor defies this characterization and clearly charts a course that goes beyond any demonstrated necessity to preserve First Amendment rights and undercuts a regulatory system fashioned by Congress which adequately serves First Amendment interests. Placing the individualized right to use broadcast facilities on a constitutional mantle in turn unnecessarily shakles the performance of the public trustee role created for licensees and renewed by this Court in its landmark decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

I.

It is now axiomatic that "unlike other media of expression, radio is inherently not available to all," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943), and consequently, a mechanism for selecting *representative* spokesmen is essential. It is for this reason that the Constitution permits a licensing scheme which provides "for the use of such [radio] channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." Section 301 of the Communications Act of 1934, 47 U.S.C. § 301. This unique characteristic of the broadcast medium also underlies previous rejections

by other courts of an individual right under the First Amendment to utilize broadcast facilities. *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950).

The holding of the lower court dramatically departs from these decisions while misreading the application of the First Amendment to broadcasting in this Court's opinions in *National Broadcasting Co.* and *Red Lion.* The cases relied upon by the lower court to construe broadcast operations as "state action" and to thereby transform broadcast advertising time into a common carrier type public "forum" are inapposite and irrelevant to a medium where designated licensees are required to act as trustees for the public interest—particularly in their affirmative obligation to maintain a full and fair flow of information, including contrasting and partisan views on public issues. Therefore, it is inappropriate to analogize broadcasting with municipal transit systems and other non-communications entities which, if they sell advertising space to commercial advertisers, do so without primary obligations for the dissemination of public information.

First Amendment objectives in broadcasting cannot be served by compelling individual stations—under guidelines devised by the Commission—to implement the kind of system of paid partisan access articulated by the lower court. The central constitutional concern in the area of broadcasting is "the First Amendment goal of producing an informed public capable of conducting its own affairs." *Red Lion*, *supra*, 395 U.S. at 392. Because of limited spectrum space that can be used for broadcasting, implementation of the essential rights at stake is necessarily shaped by this practical barrier. Consequently, First Amendment objectives in broadcasting are to be achieved, not by means of an individualized right of access, but in

the form recognized by this Court in *Red Lion*—i.e., a *collective* right of the public "to receive suitable access to social, political, esthetic, moral and other ideas and experiences." 395 U.S. at 390.

II.

A comprehensive regulatory scheme governing broadcasting was formulated by Congress based on the principle that the public's interest in receiving full and fair information on significant public issues could best be achieved through a formula of licensee trusteeship. Out of this formula have developed a number of operational criteria to insure that the statutory mandate of public service is carried out. Among these principles is the obligation, under the fairness doctrine, to devote a reasonable amount of broadcast time to the presentation of conflicting (including those of a partisan character) views on controversial issues. To date, this objective has been accomplished by the exercise of licensee discretion as to the selection of the spokesmen to appear and the subject material to be broadcast, subject to review by the Commission. Clearly, the licensee in this scheme is not a common carrier and the Communications Act specifically provides that he should not be a common carrier with respect to any of his operations.

Nothing before the lower court in these cases suggests that the First Amendment interests of the public in vigorous debate and effective self-expression are not being met through the operation of the present regulatory system. Indeed, the record reflects quite the contrary. Moreover, in the event there was evidence that any significant issues or viewpoints were being stifled, the Commission and Congress have sufficiently flexible authority to fashion those modifications which appear necessary to attain the essential objective of the fairness doctrine and the First Amendment interests that policy is intended to serve. In this respect, Congress has recently seen fit to amend the Communications Act to facilitate the

use of broadcast facilities by political candidates and the Commission is presently conducting a comprehensive inquiry which seeks to resolve whether present policies sufficiently foster the First Amendment goal of "uninhibited, robust, wide-open debate" or whether revisions or even new policies are appropriate.

III.

The practical ramifications of the lower court decision are actually fundamentally inconsistent with the First Amendment goals which it purportedly attempts to enhance. In designating broadcast advertising time as a quasi-public forum for the discussion of public issues at the initiative of private interests, the court of appeals severely inhibits licensee discretion so central to the proper vindication of the public's interests under the fairness doctrine. The requirement of an individual right of access actually diminishes the licensee's capacity to carry out his public trustee responsibility. Some of the factors contributing to this diminished capacity include weighting the initiation of public issue discussion in favor of those most able to afford the purchase of spot announcements, the need to select public issue programming to counter-balance the concentrated expression of views by private factions rather than on the basis of journalistic discretion as to newsworthiness, and the increased involvement of the government in the control of broadcast speech. In place of a public trustee system whereby broadcast licensees are accountable to the Commission as to which issues, views and speakers should be presented, the court of appeals would sanction a system of at random selection by those able to pay, expressing views on issues of self-interest and presented absent any standards of professional journalism.

In the final irony, if the "regulatory guidelines" that the lower court envisions as resolving some of the practical problems associated with the new constitutional right are

ultimately effective, they would actually thrust the federal government more directly into the decision-making process of determining and scheduling such broadcast content as news, cultural and public affairs programming. Clearly, the consequences of this course can hardly be said to enhance in any significant way the First Amendment interests that broadcasting is capable of fostering. Rather than the arms-length relationship between the government and broadcasters envisioned in the Communications Act as to the selection of program content, this decision foreshadows and even encourages the precise involvement that was intended to be avoided.

ARGUMENT

Introduction

These cases highlight the critical role the broadcast media play in keeping contemporary American society adequately informed on important public issues. That broadcasting in general and electronic journalism in particular have become major sources of information to the American public is, therefore, an undeniable threshold premise.

Into the bundle of intricate and interwoven rights and responsibilities that give broadcasting its unique regulatory and journalistic character, a negative and incompatible concept has been interjected. This concept is embodied in a newly asserted First Amendment "right" which would compel a broadcast station to sell "spot" advertising time for the expression of views on a controversial public issue without regard to previous and/or continuing coverage of the same issue based on news value criteria exercised in a traditional journalistic fashion.

Accordingly, this Court is asked to review the foregoing Constitutional contention, carried forward and re-

shaped by the court of appeals over the opposition of the agency charged with administering the Communications Act, because of its inevitable and profound consequences for all broadcast programming. In essence, to accept the new-found Constitutional right articulated by the lower court would be to reject important regulatory concepts derivative from the basic legislative framework and administrative policy based thereon.

In marked contrast to this Court's seminal decision in *Red Lion*, where the decisional context was whether certain regulatory measures were permissible under the First Amendment, here the lower court has held that, despite policy guidance by Congress or the Commission, the Constitution *compels* a divergent approach.

In this brief, ABC seeks to highlight the dubious new path that has been judicially drawn as well as to emphasize the very real practical impediments it engenders. Foremost in this evaluation, we believe, must be the recognition that the public interest is far better served by methods for the dissemination of ideas and experiences other than the personalized "right of access" recognized for the first time by the court of appeals.

I.

THE FIRST AMENDMENT DOES NOT COMPEL THE DESIGNATION OF BROADCAST ADVERTISING TIME AS A COMMON CARRIER TYPE FORUM IN WHICH BROADCAST STATIONS ARE REQUIRED TO SELL ANNOUNCEMENTS TO INDIVIDUALS OR GROUPS FOR THE PRESENTATION OF THEIR PARTICULAR VIEWS ON PUBLIC ISSUES

Congress has established, the courts have interpreted, and the Commission has long administered a statutory system for the broadcast media wherein licensees are

obligated to provide full and fair coverage of controversial public issues. As Judge McGowan correctly observed in dissenting to the lower court decision:

> "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice. . . ." [30]

Notwithstanding the order of events acknowledged by Judge McGowan, and irrespective of the Commission's determination that this scheme satisfactorily insures that the American public is adequately informed on significant public issues,[31] the court of appeals has ruled that the First Amendment dictates that broadcast advertising time should be placed on a common carrier type basis to permit individuals and groups to utilize spot announcements to espouse views on the same issues broadcasters are otherwise required to cover.

In determining that the First Amendment establishes a right of access to a particular segment of broadcast time, the lower court's decision is squarely in conflict with prior decisions on the matter. While cognizant of the well-established principle that the First Amendment applies to governmental and not to private actions,[32] the court below found that the interrelationship between the FCC and its licensees is such that broadcast station operation effectively represents "state action" to which First Amendment protections extend.[33] That basic finding, however—essential to the court's ultimate holding—as well as the consequent entitlements it implies, was

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[30] App. 490.

[31] App. 269.

[32] See, *e.g.*, *United States* v. *Guest*, 383 U.S. 745, 755 (1966).

[33] App. 458-64.

specifically eschewed in *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

In rejecting a religious organization's claim that it had a statutory and First Amendment right to purchase time on a station for the broadcast of its programs, the Third Circuit expressly pointed out that the broadcaster "is not an instrumentality of the federal government" for constitutional purposes. *Id.* at 601. Rather, the court recognized that under the regulatory scheme established by the Communications Act, a significant separation between the broadcaster and the state is evident in Congress' having "confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations." *Id.* at 600. The court explained:

> "True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum. . . . [A] radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones." [34]

Similarly, in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950), the First Circuit adopted the District Court's view that the conduct of broadcast licensees did not constitute "state action" as to which the First Amendment right of access asserted and upheld below would apply.

Significantly, the court of appeals specifically acknowledged the inconsistency of its decision with the First and Third Circuit decisions, but dismissed those decisions as representing a "crabbed judicial view of 'state action'." [35]

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[34] 151 F.2d at 600-01. See also *Avins* v. *Rutgers*, 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[35] App. 456. As noted, the *McIntire* court clearly rejected the view urged upon it that the respondent radio station was endowed "with the quality of an agency of the federal government", emphasizing

The lower court further found this Court's *Red Lion* decision—read to be "a clarion call for a new public concern and activism regarding the broadcast media" [36] —to clear the path of such "doctrinal impedimenta."

A. The Relevant First Amendment Objective Is to Guarantee That the Listening and Viewing Public is Not Left Uninformed—Not to Guarantee an Individual Right of Access.

This Court has, over the years, clearly emphasized that the essence of the First Amendment's protection of free speech and a free press is to protect the public generally, rather than particular private interests. See *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Red Lion*, *supra*, 395 U.S. at 390. The objective in this process has been to assure that the general citizenry will have the necessary information to make the informed judgments on which a self-governing society is dependent.[37] In brief, the essential spirit of the free speech guarantee of the First Amendment is the right of the public to hear a diversity of viewpoints, thereby creating an informed public, and is not primarily founded upon

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that to so find "would be judicial legislation of the most obvious kind". *McIntire*, *supra*, 151 F.2d at 601. In rather dramatic contrast, the lower court in the instant cases not only found broadcast stations to be "agents of the government" but judicially inaugurated a sweeping reformation of the manner in which broadcasting is conducted—imposing completely new standards regarding the utilization of broadcast advertising time. See App. 448.

[36] App. 457.

[37] *Red Lion*, *supra*, 395 U.S. at 392. See also *Whitney* v. *California*, 274 U.S. 357, 375-377 (1927) (Concurring Opinion of J. Brandeis); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388-89 (1967); *Greenbelt Cooperative Publishing Assoc.* v. *Bresler*, 398 U.S. 6, 11 (1970). In *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966), this Court remarked that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."

protection of an individual right of self-expression. "[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).[38]

It is virtually undisputed that the First Amendment applies to radio and television. Whatever doubts might once have existed about the applicability of the First Amendment to mass communications media were dispelled in *United States* v. *Paramount Pictures*[39] where this Court stated that it had "no doubt" that radio, newspapers and moving pictures were covered by the First Amendment. However, the operating and technical nature of broadcasting—a simultaneous and indiscriminate communications technique utilizing a limited spectrum—dictates that the First Amendment objective of an informed public be implemented in a special way. As this Court emphasized in *National Broadcasting Co.* v. *United States*:[40]

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because

[38] See also *Banzhaf* v. *FCC*, 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969) where the District of Columbia Circuit remarked that "[d]ebate is not primarily an end in itself. . . ."

[39] 334 U.S. 131, 166 (1948). See also *Federal Communications Commission* v. *American Broadcasting Co.*, 110 F. Supp. 374, 389 (S.D. N.Y. 1953), *aff'd*, 347 U.S. 284 (1954); *Rosenbloom* v. *Metromedia, Inc.*, 415 F.2d 892 (3rd Cir. 1969), *aff'd*, 403 U.S. 29 (1971). In *Rosenbloom* v. *Metromedia*, the Third Circuit stated that "no rational distinction can be made between radio and television on the one hand and the press on the other in affording the constitutional protection contemplated by the First Amendment." *Id.* at 895.

[40] 319 U.S. 190 (1943).

> it cannot be used by all, some who wish to use it must be denied.[41]

Such considerations were integral to this Court's analysis of the First Amendment's application to broadcasting in *Red Lion*. Acknowledging at the outset that the natural dearth of frequencies necessarily limits the individuals who can broadcast, the Court concluded that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S. at 388. Accordingly, differences in the characteristics of particular media "justify differences in the First Amendment standards applied. . . ." *Id.* at 386. See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952). As to the broadcast media, it is the right of viewers and listeners which is "paramount" under the Constitution and may not be abridged. *Red Lion, supra*, 395 U.S. at 390. The peculiar characteristics of broadcasting underscore that this is to be achieved in the form of a collective right of the public "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Ibid.*

The court of appeals has drastically departed from the principles underlying application of the First Amendment to broadcasting developed in the *National Broadcasting Co.*, and *Red Lion* cases. In insisting upon a personalized right of access, irrespective of the licensee's coverage of controversial issues, the lower court has raised an individual right of self-expression over the First Amendment interests of the public as a whole. It has, therefore, created an individual right of access in the face of past teachings that the broadcast medium is uniquely unsuited for such a concept. While a similar right of access may be adequate or constitutionally mandated for a public park or municipal transit system, it is neither adequate nor constitutionally mandated for a limited speech forum represented by the commercial radio spectrum.

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[41] *Id.* at 226.

B. A Finding That Broadcast Operations Are "State Action" Is Fundamentally Inconsistent With the First Amendment Requirements for Broadcasting.

In reaching its conclusion that the First Amendment mandated a right of access to broadcast advertising time, the court of appeals found "state action" in the activities of broadcast licensees. In this analysis the court relied at least partially on prior holdings that transportation systems [42] and school newspapers [43] operated by a public authority, could not, if they accepted advertising at all, refuse paid editorials. However, broadcasting is not a "public authority" in the context that its normal use originates with at random individual members of the public. While broadcasting is specifically intended to be responsive to the needs of the public as a whole, it is not designed to be "held out" to the public at large for indiscriminate use by individual members of that public. Further, unlike public transportation systems, there is no question of excluding certain views or a particular form of speech in broadcasting, because the statutory and regulatory scheme will not permit such exclusion. With public buses the only speech format is the advertising; with broadcasting the primary speech format is non-advertising time. As to the newspaper cases cited by the lower court,[44] it is sufficient to note that they involved media actually owned by government institutions, whereas broadcasting is cast in a private enterprise pattern and is specifically insulated with First Amendment in-

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[42] *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Reptr. 430 (1967); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D. N.Y. 1967); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash. 2d 63, 455 P.2d 350 (1969).

[43] *Lee* v. *Bd. of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D. N.Y. 1969).

[44] *Ibid.* See App. 472.

interests of its own in its relationship with the government.[45]

The lower court found state action under an even broader rationale. In this scenario, broadcasting is licensed and regulated in the use of designated spectrum space, and the airwaves "are 'a limited and valuable part of the public domain,' leased out temporarily by the federal government which retains ultimate control over them." [46] In essence, the court suggests that "state action" for First Amendment purposes stems from the circumstance that broadcasting is a regulated entity. But nearly every dimension of contemporary society falls either temporarily or permanently within the purview of some administrative agency at some level of government. It is also equally fruitless to suggest that the degree of regulation is determinative in this equation since this could comprehend qualitative factors and broadcasting connotes an enterprise where specific provision has been made to minimize "state" involvement.

In laying the legislative foundation for broadcasting, Congress deliberately elected to place primary responsibility for operational decisions with private licensees rather than the federal government. Inherent to that design, moreover, was the creation of a relationship which

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[45] See 47 U.S.C. § 326. The lower court also relied in this context on *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952) where this Court found that the activities of a bus company, which was privately owned but had operated under the regulatory jurisdiction of a government agency, amounted to "state action." Again, however, in this licensee situation the entity is one that normally holds itself out for the common carriage of the public, on demand, unlike broadcasting. Further, as noted, Congress has seen fit to fashion a specific regulatory regime in which, *inter alia*, a unique First Amendment relationship between government and private licensees has been forged.

[46] App. 460, quoting, in part, from *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

would minimize direct interference by the licensing authority. Accordingly, the state is specifically forbidden to directly exercise programming judgments (47 U.S.C. § 326) and the non-common carrier status of broadcasting (47 U.S.C. § 153(h)) precludes detailed supervision of many operational facets.[47]

It is clear, therefore, that the statutory structure established by Congress for the regulation of broadcasting, as well as the medium's practical development in American society, defy a categorization of radio and television as public forums in the sense normally attributable to a finding of state action. The overriding factor of broadcast operations is that primary responsibility for broadcast material is lodged not with the federal government, but in private entities operating as free from direct interference by the Commission as possible.

The most obvious thing about broadcasting is that it is unique as a communications instrument and, as such, is neither analogous to public streets, parks and facilities nor to regulated entities in the common carrier or public utility mold. Accordingly, such previous decisions of this Court as *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) and *Marsh* v. *Alabama*, 326 U.S. 501 (1946), form an inadequate basis for so drastically transforming the function and role of the broadcast media. While those cases extended the "state action" concept to protect First Amendment rights from infringement by persons and entities claiming a private function, the activities and "forums" involved totally inapposite circumstances—a company town (*Marsh*) and a suburban shopping center parking

[47] For instance, under Title II of the Communications Act, which governs such common carrier activities as telephone and telegraph, the Commission is empowered to regulate rate and profits of carriers, as well as the conditions of service. No such authority exists over broadcasting which is regulated under Title III of the Act.

lot (*Logan Valley*)—where, unlike broadcasting, the facilities had been dedicated to a previous at random public use. For instance, the owners in these circumstances had allowed general public access to the facilities, but denied access for peaceful picketing or leafleting. To argue that there is no "state action" in a traditional sense is not to say that broadcasting is not affected with a strong public interest character; rather, the point worthy of emphasis is that broadcasting simply cannot be equated with other speech forums in terms of its openness and ready availability to the public. For example, a state controlled newspaper is both state directed and unlimited in its capacity to add lines of type and pages of print. Similarly, a public park is, in the normal course, entered at the discretion of the public, not a private gatekeeper.

It has long been acknowledged that application of the First Amendment turns on the purpose and function of the medium of communication involved. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502-03 (1952). "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression. On the contrary, each particular avenue for expression presents its own peculiar problems." [48] In point of fact, the ease and manner of access to a particular forum must vary with the nature and limitation of that forum—conditions which must take into account the interests the forum is designed to serve beyond catering to individual requests. Accordingly, what is appropriate for a municipal park or bus terminal is not necessarily appropriate for a medium such as broadcasting that has journalistic responsibilities.

In the "state action" cases relied upon by the lower court, the person or entity required to permit access was

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[48] *Avins* v. *Rutgers*, 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

engaged in no independent journalistic role, but served merely as a passive instrumentality for the speech activities of others. In other words, the function at issue was more traditionally one of common carriage where facilities are generally and principally publicly utilized. In broadcasting, licensees are charged with the duty to present the speech of others as well as their own with the ultimate responsibility for broadcast content resting with the stations.

In sum, by attaching a state action status to broadcast activities and creating a right of access to at least a portion of radio and television time, the court of appeals has misconstrued the previous decisions of this Court treating the relationship of broadcasting and the First Amendment. See, *e.g.*, *National Broadcasting Co.*, *supra*, 319 U.S. at 226. Indeed, in its more recent *Red Lion* opinion, this Court emphasized that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [49]

The plain meaning of *Red Lion*, we suggest, is that private interests must necessarily be subordinated to the paramount public interest in prudent utilization of the limited technical resource. Integral to such use is the presentation of "*representative* community views" on public issues. *Id.* at 394. (emphasis added). The critical right protected by the First Amendment as it applies to

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[49] *Red Lion*, *supra*, 395 U.S. at 388. Perhaps the ultimate irony of the lower court opinion in this regard is that, upon a finding of "state action" in broadcast operations, and the establishment of a broad constitutional right of paid partisan access to the medium, the court concludes that this "right" is "abridgeable" and might not be given any effect if a broadcast station carried no commercial advertising. (App. 475). Therefore, although non-commercial educational stations are fully comprehended by the statutory scheme and Commission regulations designed to enhance the public's right to full and fair information, they would presumably be exempt from the system initiated by the lower court.

broadcasting is the right of the viewing and listening public to be informed (*id.* at 390):

> "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."

The individual access result reached by the court of appeals is not only different from the collective public access right approved by this Court in *Red Lion*, it represents a disservice to the very First Amendment interests on which the opinion below relies. Furthermore—as we now demonstrate—irrespective of the lower court's erroneous conclusion that broadcast operations are "state action", a comprehensive and flexible regulatory scheme exists to ensure that broadcast stations do not discriminate against speech on public issues and that the First Amendment interests of the public are fully vindicated.

II.

AN INDIVIDUALIZED "RIGHT" TO PURCHASE SPOT ADVERTISING TIME ON BROADCAST STATIONS TO DISCUSS CONTROVERSIAL ISSUES WHICH HAVE BEEN COVERED IN OTHER BROADCAST PROGRAMMING IS FUNDAMENTALLY INCONSISTENT WITH THE SYSTEM OF REGULATION SELECTED BY CONGRESS.

In holding that private individuals and groups have a First Amendment entitlement to purchase spot announcements on broadcast stations, the court of appeals opinion represents, as we have shown, not only a misconception of this Court's prior decisions dealing with the relationship of broadcasting and the First Amendment, but also a fundamental inconsistency with the Congressional design of the broadcaster-federal government relationship fashioned in the Communications Act of 1934.

A. A Comprehensive Legislative and Administrative Framework Insures that Broadcast Licensees Serve the Public Interest Through the Presentation of Full and Fair Information on Significant Public Issues.

Since broadcasting, unlike other modes of expression, is inherently unavailable to all, it has been necessary to erect a mechanism to govern the inevitable selection process.[50] It was in recognition of this characteristic that the Commission in its early formulation of the fairness doctrine noted as follows:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups of individuals who might be more appropriate spokesmen for the particular point of view than the person making the request." [51]

In essence, prior to the lower court decision, the abiding concept was that it is the "right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his particular views on any matter, which is the foundation stone of the American system of broadcasting." *Editorializing Report*, 13 F.C.C. at 1249; see also *Red Lion*, *supra*, 395 U.S. at 390 (1969). Indeed, the District of Columbia Circuit has recently reaffirmed an earlier statement made by a different panel of that court, in a case decided prior to the instant cases, that no individual or group has a right of access. Thus, in dealing with the Democratic National Committee contention that the DNC had an organiza-

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[50] See *National Broadcasting Co., supra*, 319 U.S. at 226; *Red Lion, supra*, 395 U.S. at 388.

[51] *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1251-52 (1949).

tional right to broadcast time to respond to Presidential appearances, the court concluded as follows:

> "We believe DNC's position to be fallacious and point to our recent decision in *Green* v. *FCC* [447 F.2d 323, 328 (D.C. Cir. 1971)], where we state that no individual or group 'has the right of access to the air; the licensees may exercise their judgment as to what material is presented and by whom'." [52]

The lower court, we submit, too conveniently ignores the conceptual underpinning of the broadcast media and the practical conditions which have grown up around broadcasting. Rather than attaching a common carrier status to broadcasting, Congress specifically chose to establish a system under which limited-term licenses are granted for use of broadcast frequencies,[53] and licensees are committed to operate their facilities in the "public interest." [54] This system entails a procedure of periodic review to ensure that the overall operation of given broadcast facilities is consistent with the needs and interests of the respective communities involved.

Under the broad public interest standard, a number of operational criteria have developed. Thus, out of the statutory mandate of public service have evolved such basic principles as (1) the licensee obligation to periodically survey communities served in order to ascertain problems and interests [55] and (2) the obligation, under

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[52] *Democratic National Committee* v. *FCC*, D.C. Cir., No. 71-1637, decided February 2, 1972, slip op., p. 37, *petition for certiorari pending* (Case No. 71-1405).

[53] Section 307(d) of the Communications Act. 47 U.S.C. § 307 (d).

[54] The guiding standard of the Communications Act is that the allocation of facilities and their continued utilization serve the "public convenience, interest, or necessity." See *e.g.*, 47 U.S.C. §§ 307(a) and 309(a).

[55] *Suburban Broadcasters*, 30 F.C.C. 1021 (1961), *aff'd sub nom. Henry* v. *FCC*, 302 F.2d 191 (D.C. Cir. 1962); *Minshall Broadcasting Co.*, 11 F.C.C. 2d 796 (1968); *Primer on Ascertainment of Problems By Broadcast Licensees*, 27 F.C.C. 2d 650 (1971).

the fairness doctrine, to devote a reasonable amount of broadcast time to the presentation of conflicting (including those of a partisan character) views on controversial issues. A further distinguishing characteristic of the broadcast medium, therefore, is that different licensees meet their responsibilities in different ways. This is not only reflective of the statutory scheme and the Commission policies which promote flexibility in serving public needs and disseminating news and information, it is a logical and necessary consequence of the variety of broadcast facilities.[56]

Any suggestion that significant viewpoints are excluded from the broadcast airwaves is simply unfounded on the record in these cases. Indeed, the complainant groups below (DNC and BEM) acknowledge either implicitly or explicitly that they seek a special kind of access to the broadcast media that ignores consideration of whether a particular viewpoint has previously been presented on broadcast stations[57] and, in this context, whether the public has been adequately informed as to that viewpoint. The fact is that neither the Commission nor the court below has made a finding that the fairness doctrine and other administrative policies flowing from the legislative framework established by Congress are in-

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[56] In addition to the three major television networks (and some special networks), there are at least seven national radio networks (plus the recent announcement of Black-oriented and Spanish-language radio networks, *FCC News Release*, No. 10624, April 26, 1972). Also see *F.C.C. Public Notice No. 85462*, released June 7, 1972, indicating that as of May 31, 1972, there were 4368 commercial AM radio stations; 2,341 commercial FM stations; and 701 commercial television stations. In addition, there were 518 educational FM stations and 214 educational television stations.

[57] For example, in the *BEM* case the record shows that WTOP had presented a wide variety of representative views on the Vietnam War, including the specific viewpoint BEM sought to broadcast. In the *DNC* case, the complainant had not even specified the issues or particular viewpoints it wished to express.

sufficient to satisfy the First Amendment interest of an informed public. Indeed, the Commission was of the very opposite persuasion, that the present regulatory system affirmatively serves the paramount right of the public to receive access to information on significant issues and experiences, and that engrafting an individual right to purchase advertising for these purposes would actually inhibit and frustrate the overall public interest objective.[58]

Accordingly, the record in these cases will not support a contention that the public faces any informational gap or, indeed, that most licensees do not now afford sufficient access for ideas and opinions expressed by partisan voices. Nevertheless, the court of appeals has determined that there should be a right of access to a limited kind of broadcast time without consideration of the degree of access that is available in different forms on the multitude of broadcast stations throughout the country. In contrast, of course, the administrative agency given the responsibility for measuring public needs in this regard has concluded that although (1) there is no present deficiency in the information the public receives[59] (2) a general reexamination of contemporary requirements and procedures is nevertheless warranted.[60] Additionally, it is important to emphasize that no Commission policy precludes any station from selling any type of broadcast

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[58] See, *e.g.*, App. 269.

[59] App. 258.

[60] Accordingly, the Commission has recently launched an administrative proceeding which, in the context of the fairness doctrine, represents a comprehensive exploration of the process by which public issue information is disseminated via the broadcast media. The specific objective of this proceeding is to ascertain what problems, if any, exist and, where appropriate, to devise suitable solutions therefor. See *In re Notice of Inquiry in Docket No. 19260*, 30 F.C.C. 2d 26 (1971).

time to persons and groups for the discussion of controversial issues.[61]

By singling out a certain block of broadcast time and enveloping the right to purchase such time in a constitutional mode, the court of appeals introduces a new conceptual standard that will adversely affect all broadcast programming. Under the existing broadcast system, it is not necessary to set aside a definable time period for the expression of viewpoints; a typical broadcast station already accomplishes this, and more effectively, in a number of different ways. These include, *inter alia*, replies to editorials, the appearance of private and public officials in discussion and documentary programming, telephone call-in programs, guest appearances on entertainment/talk shows, the reading of viewer's written opinions and editorial "feed-back" programs, the open-mike procedure allowing listeners to telephone in comments which can be taped and then re-broadcast, the carriage of editorials suggested by members of the public and interviews within news programs.[62]

The record in these cases clearly offers no support for a conclusion that the present system of broadcast regulation does not adequately serve the paramount First Amendment right of the public to be informed. Furthermore, the regulatory regime set out by Congress not only does not require broadcast licensees to sell advertising time to individuals or groups to present their particular views on public issues,[63] it deliberately rejects a system of individual access.

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[61] App. 265.

[62] See Alfred I. DuPont—COLUMBIA UNIVERSITY SURVEY OF BROADCAST JOURNALISM 1970-1971, pp. 7-31.

[63] A fact conceded by the court below (App. 455).

1. ***The Public Trustee Concept Underlying the Statutory Standard Deliberately and Inherently Rejects A Common Carrier Role For Broadcasting.***

In setting the legislative foundation culminating in the Communications Act of 1934, Congress affirmatively rejected the proposition that the broadcast media should be subjected to an individualized right of access. One of the clearest manifestations of this fundamental decision is found in Section 3(h) of the Act which expressly provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h).[64] Any standard

[64] Not only the plain language of the statute, but the legislative history indicates that the decision by Congress to reject a common carrier status for broadcasting, and consequently to make licensees responsible for program selection and content, was a deliberate decision. For instance, during the early debate on the Radio Act of 1927 (44 Stat. 1162), Congress considered and subsequently rejected the notion that broadcasters should be charged with a common carrier responsibility. In deliberations leading to enactment of the 1927 Act, the original bill as reported by the Senate Committee contained a common carrier provision to the effect that "if any licensee shall permit a broadcasting station to be used . . . for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters, the licensee shall be deemed a common carrier in interstate commerce." 67 CONG. REC. 12503 (1926); S. REP. NO. 772, 69th Cong., 1st Sess. 4 (1926). However, this language was deleted from the committee bill by the full Senate. See 67th CONG. REC. 12501-02 (1926). A subsequent revision of this portion of the bill resulted in Section 315 affording reply opportunities only in the limited situation involving political candidates. In the Conference Report that followed, Congress reaffirmed the conclusions reached in the Senate debate that it would be unwise to cloak broadcasting with a common carrier status. See 68 CONG. REC. 2567 (1927). Several years later during deliberations on the successor Communications Act of 1934, efforts were renewed to legislate some form of broadcast media access. For instance, Congressman McFadden proposed that broadcasting stations be forbidden to discriminate against programs sponsored by any religious, charitable or educational association. H.R. 7986, 73rd Cong., 2d Sess. (1934). The Federal Radio Commission opposed the Mc-

along the lines suggested by the court of appeals that broadcast licensees must make one segment of their broadcast time an open forum (however modified) for the sale of time to persons and groups for the presentation of their views on public issues, would, in effect, make broadcasters "common carriers" in contravention of the express language of Section 3(h) of the Communications Act—and in basic disharmony with the public trusteeship formula otherwise characteristic of the broadcast section of the legislation.[65]

The plain meaning of the statutory language and the legislative history which rejects placing broadcasting on a common carrier basis, has been, up to now, consistently affirmed by judicial interpretation. In *McIntire* v. *William Penn Broadcasting Company*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the Court of Appeals for the Third Circuit held that it would be inconsistent with the Communications Act to hold that a religious organization had a right to purchase time on a station for the broadcast of its programs. The court stated that "it is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC", and that "Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations." *Id.* 599-600. Consequently, "a radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones." *Id.* at 601. See

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Fadden Bill and it was not reported out of committee. *Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess. 349-52 (1934). Accordingly, as finally adopted, the Communications Act of 1934 specifically declared that broadcasters are not to be deemed common carriers.

[65] Compare 47 U.S.C. §§ 307(a), 308(a), 309(a) and 315(a). See also Section 326 of the Act, 47 U.S.C. § 326.

also *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

We believe that the essence of the *McIntire* and similar decisions was recognized by this Court in *Red Lion*. The thrust of that decision is not that the broadcast licensee is a common carrier, required to sell time to all applicants on public issues, but rather that he is a public trustee—a proxy—who must present *representative* community views and voices on controversial issues. The decision thus stresses the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over given broadcast facilities.

In summary, the regulatory system established by Congress proceeds from two interrelated principles. One, rather than sharing the common carrier monopoly role ascribed to telephone and telegraph, broadcasting was to be characterized by private ownership operating on frequencies assigned under a public interest standard by an expert regulatory agency. Secondly, the designated licensees of such frequencies, in marked contrast to the passive role of common carriers under the Communications Act, were to bear an affirmative responsibility for the content of material broadcast, acting in a trustee capacity for the public at large. This initial legislative distinction shapes and permeates our entire system of broadcast regulation.

2. *Developments In Administrative Interpretation and Statutory Amendment Demonstrate the Viability of the Public Trustee System.*

Commission administration of the legislative scheme, and amendments thereto by Congress over the years, cumulatively reflect the vitality and practical wisdom of the threshold decision that broadcasters are to be trustees for the public, not common carriers. Moreover, pertinent developments aptly demonstrate that the sys-

tem designated by Congress is capable of making adjustments which, in a contemporary setting, appear necessary to continue to serve as well as preserve the public's paramount right to be informed.

Issued fifteen years after passage of the basic statute, the Commission's *Report on Editorializing by Broadcast Licensees*[66] represents the agency's most comprehensive articulation of the fairness doctrine[67] which—while not in the 1934 Act—was adopted in recognition of the public's right to receive full and fair information on all significant issues. This Report was issued in connection with public hearings designed to clarify the obligations of broadcast licensees and to explore various problem areas.[68] The Report emphasized that the licensee was to perform as a public trustee, and, in this capacity, could determine what should be broadcast and by whom, making such decisions in a manner that would promote the public's First Amendment interests in free and open debate. In the Commission's words[69]:

> "Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be

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[66] 13 F.C.C. 1246 (1949).

[67] The doctrine, however, had been enunciated in one form as early as 1929 by the Federal Radio Commission. See *Great Lakes Broadcasting Co.*, 3 F.R.C. Annual Report 32 (1929).

[68] *Report on Editorializing, supra,* 13 F.C.C. at 1246. See also note 60, *supra,* describing more recent activities of the Commission in this regard. In the pending proceeding initiated in 1971, the Commission has framed the basic objective of its current review as being directed to an examination of whether Commission policies promote to the maximum extent possible the national goal of fostering "uninhibited, robust, wide-open" debate on public issues. *In re Fairness Doctrine Study, supra,* 30 F.C.C. 2d at 27.

[69] 13 F.C.C. at 1250.

> afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public."

Therefore, the essential ingredient of the fairness doctrine as originally formulated was the principle that the public interest is best served by requiring the presentation of opposing viewpoints on controversial issues under the supervision and control of licensees. In 1969 when this Court addressed the fairness doctrine and its extension in the political editorializing and personal attack rules,[70] the main thrust in sustaining these Commission policies was the paramount First Amendment interest that resided with the public at large. *Red Lion, supra,* 395 U.S. at 390.

At about the same time the Commission was developing and refining the fairness doctrine, repeated attempts were being made in Congress to expand the coverage of Section 315 of the Communications Act which had been originally fashioned only to extend "equal opportunities" to opposing political candidates in the use of broadcast

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[70] These rules represent an instance in which the Commission deemed it necessary to formulate detailed and definitive guidelines to govern licensee conduct in certain limited circumstances (See note 90, *infra*). Otherwise, the fairness doctrine has been refined over the years on a case-by-case basis. See *Applicability of the Fairness Doctrine to Broadcast Licensees*, 29 *Fed. Reg.* 10415 (1964). The Commission has, moreover, modified the fairness doctrine as it applies to political broadcasts to the extent of adopting a "quasi-equal opportunities" approach in defined instances. For example, it has recently ruled that when a station sells time to spokesmen for or supporters of a political candidate during an election campaign, it must likewise make time available on the same basis to spokesmen for or supporters of opposing candidates. *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707 (1970).

facilities.[71] In brief, despite such attempts to expand the coverage of Section 315 to spokesmen for candidates and other election issues[72]—Congress has carefully circumscribed the purview of Section 315.

In the first significant modification of that provision —the 1959 amendments—Congress actually refined the scope of Section 315 by exempting from the equal opportunities requirement appearances by candidates on newscasts, news interviews, news documentaries, and on-the-spot coverage of news events. 73 Stat. 557 (1959). Thus, Congress intended to restrict the right of individual access for candidates to broadcast facilities and thereby preserve to the greatest extent possible journalistic discretion in broadcasting.[73]

Of perhaps even greater significance, the 1959 amendments also saw Congress ratify and adopt the Commission's fairness doctrine as part of the public interest standard[74] by the addition of this sentence to Section 315(a)[75]:

> "Nothing in the foregoing sentence [containing the news exemptions] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and

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[71] See note 64, *supra*.

[72] See, *e.g.*, H.R. 3595, 80th Cong., 1st Sess. (1947) (to extend "equal opportunities" to spokesmen for political candidates, political parties, the discussion of referendum questions and the discussion of differing viewpoints on public questions); H.R. 6949, 81st Cong., 2d Sess. (1950) (similar to H.R. 3595, but not inclusive of public issue discussion); H.R. 11851, 87th Cong., 2d Sess. (1962) (opportunities for response required when an individual is subject to ridicule by a candidate utilizing Sec. 315 time).

[73] See H.R. REP. No. 802, 86th Cong., 1st Sess. 4-7 (1959); S. REP. No. 562, 86th Cong., 1st Sess. 9, 13-14 (1959).

[74] See *Red Lion*, *supra*, 395 U.S. at 381-85.

[75] 47 U.S.C. § 315(a).

> on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Since the concept of licensee discretion and responsibility, as distinguished from an individualized right of access, is central to the fairness doctrine, the absorption of this Commission policy in the 1959 statutory amendments makes the concept an integral part of the basic legislative fabric.

The dynamics of the legislative process as it bears on our communications system is also reflected in the 1972 amendments to the Communications Act. These amendments not only vastly alter the requirements pertaining to the use of the "communications media" for political purposes,[76] they are indicative of the role Congress is able to exert in overseeing the basic statutory system. Just as Congress initially rejected a common carrier role for broadcasting—electing instead to place programming responsibility with licensees—in a more contemporary environment it has responded to what it perceived as a special need in the political area.

Accordingly, the newly enacted Campaign Communications Reform Act[77] amends the Federal Communications Act to require broadcast licensees to allow reasonable access to their facilities by candidates for federal elective office. Section 103(a)(2)(A) of this Reform Act

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[76] Among the major changes effectuated by the 1972 amendments are the establishment of spending limits by some political candidates in the communications media, greatly modified campaign contributions reporting requirements, and the fixing of maximum rates various media may charge for the use of their facilities by political candidates. See CONF. REP. No. 92-580, 92d Cong., 1st Sess. (1971).

[77] PUB. L. No. 92-225, Title I (February 7, 1972).

amends Section 312(a) of the Communications Act to read as follows[78]:

> "The Commission may revoke any station license or construction permit—
>
> > (7) for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

Section 103(a)(2)(B) of the new statute amends Section 315(a) of the Communications Act[79] by adding the three italicized words to the following language:

> "No obligation is imposed *under this sub-section* upon any licensee to allow the use of its station by any [political] candidate." (Emphasis added).

These amendments are, therefore, consistent with previous Commission and Congressional determinations that the public interest requirements for the presentation of issues of public importance within the inherent limitations of the broadcast spectrum are a practical task peculiarly suited to resolution by Congress or by the Commission. They are also reflective of the awareness and ability of Congress to modify the basic legislation so as to grant or preclude such individualized media access as is deemed necessary[80] and consistent with the overall

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[78] 47 U.S.C. § 312(a).

[79] 47 U.S.C. § 315(a).

[80] See, *e.g.*, S. J. RES. 209, 91st Cong., 2d Sess., introduced by Senator Fulbright on June 10, 1970 and subsequently considered but not acted upon by the Senate Subcommittee on Communications. This measure was designed to develop a Congressional right of access to counter-balance the use of television by the Executive branch of the government. It would have amended Section 315 of the Communications Act to provide that licensees set aside "a reasonable amount of public service time to authorized representatives [of Congress] to present the views of the Senate and the House of Representatives on issues of public importance."

regulatory scheme—a pattern which vests with licensees the responsibility to choose, subject to their obligations under the fairness doctrine, what issues should be covered, what manner of presentation is most appropriate and what spokesmen are best suited to present the various sides of such issues.

III.

THE DECISION OF THE COURT OF APPEALS WILL SUBSTANTIALLY IMPEDE THE PERFORMANCE OF A LICENSEE'S PUBLIC TRUSTEE ROLE, DIMINISH THE EXERCISE OF A BROADCASTER'S JOURNALISTIC DISCRETION, AND INCREASE GOVERNMENTAL CONTROL OF BROADCAST SPEECH.

Reversal of the lower court's decision is particularly warranted in light of the substantial adverse impact its implementation will have on the broadcast industry generally, and on the future administration of the Communications Act. As noted, the American system of broadcasting has been founded on a recognition that by its inherent nature the medium cannot be available to all,[81] and a determination that broadcasters, rather than government, should perform the function of determining who can be accommodated.

In performing that dimension of his "public trustee" role involving the selection of material to be broadcast, the licensee is guided by a standard which anticipates a "diligent, positive and continuing effort . . . to discover and fulfill the tastes, needs and desires of his community or service area." [82] Generally, this entails a discretionary

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[81] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943); *Larus & Brother Co.* v. *FCC*, 447 F.2d 876, 882 (4th Cir. 1971).

[82] *En Banc Program Policy Statement*, 20 Pike and Fischer, Radio Regulation 1901, 1915, 25 Fed. Reg. 7291, 7295 (1960).

allocation between entertainment and non-entertainment programming, and determinations as to the scheduling and time devoted to such program categories as education, religion, sports, minority interest, news and public affairs.

This fundamental regulatory principle has also been the essential predicate for the Commission's fairness doctrine which, while requiring treatment of opposing views on controversial issues, permits licensee discretion in the selection of spokesmen, schedules and program format. Under the terms of the lower court's decision, however, that discretion is significantly diminished; broadcasters would apparently no longer be able to decide to exclusively meet their "fairness" obligations by public affairs and news programming, even though this may seem to be the approach best designed to *inform* the public.[83]

The likely practical effects of the court of appeals opinion include weighting the initiation of public issue discussion in favor of those most able to afford the purchase of "editorial advertising," the resultant heavier involvement of the Commission in disputes over who is to have access, and the transformation of public affairs programming from an innovative, self-initiating posture to something more and more restricted as it is increasingly employed as a responsive device for spot announcements.

Although the lower court attempted to discount the serious consequences of its ultimate holding with a corrollary declaration that there is no absolute right in any

[83] The lower court actually acknowledges the essentially distorted and artificial expression of viewpoints possible from their presentation in a fleeting 20 or 30 second form. "We recognize, of course, that the onesidedness and private editing of particular 'spot' editorial advertisements may in the end steer viewers and listeners away from the 'truth' by distorting complex issues." (App. 472). Objective information value would be even further diminished by the non-applicability of such policies as the fairness doctrine to private "editorial advertisers" and the absence of professional journalism standards.

person or group to air any particular "editorial advertisement" [84] and that licensees need only accept *some* such announcements under guidelines to be devised by the Commission,[85] the practical detriments to the overall public interest are not so easily avoided. Clearly, if a right of broadcast access is to be individualized on a constitutional mantle, the process of promulgating and enforcing "reasonable" rules cannot avoid impairment of a licensee's capacity to fulfill his overall obligations to the public.

Two principal characteristics typify network and station advertising time—it is limited (especially in "prime time" when heavy demand accentuates the inherent time restrictions) and it is expensive. Under the system established by the court of appeals, a premium is automatically placed on wealth in at least initially using broadcast facilities to disseminate controversial issue advertisements. Consequently, undue encouragement is given to the exposure in this format of either (1) the *side* of a controversial issue espoused by those of greatest wealth or (2) the limited *issues* which only attract well financed competing groups. This not only produces an unwarranted discrimination against particular viewpoints and particular issues, but represents a direct impediment to the paramount right of the public to be informed by receiving access to a broad range of social, political and other ideas and experiences. *Red Lion*, *supra*, 395 U.S. at 390.

A less tangible but equally pertinent impact of the system imposed by the court of appeals decision is that broadcaster independence in the news and public affairs area is necessarily diminished to the extent there may be a need to place such programming in a contrasting posture to the paid controversial issue announcements of

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[84] App. 482.

[85] App. 482, 485.

others broadcast throughout the day, week or month. In the normal course, news and public affairs programming is designed to be responsive to the fluctuating needs and interests of the public as a whole. To a significant extent, therefore, public events and problems determine program relevance. However, the changes set in motion by the court of appeals are potentially disruptive of this traditional journalistic process. For in many cases broadcasters will be forced to consider factors other than news value as a motivation for public affairs programming—placing increasing emphasis in content selection on matters which, irrespective of primary news value, may be the subject of extended treatment in spot announcements prepared by controversial issue advertisers.

Thus, unless one assumes that issues initiated by advertisers—issues which, because of a lack of newsworthiness, a broadcaster may not have intended to cover—can be adequately covered exclusively by paid spot announcements, a broadcaster would be expected to devote a certain amount of his regular "program" time (news, public affairs, etc.) to the presentation of contrasting views in order to discharge his public trustee role of keeping the public adequately informed on the issues. In brief, the broadcaster will not only be forced to relinquish a degree of control in initially selecting his news and public affairs programming, he may have to substitute programming representing a view contrary to that expressed in a concentrated series of spot announcements for programming previously planned on a subject matter of greater relevance to his audience. This anomaly was recognized by dissenting Judge McGowan who correctly characterized the distorted design nominated by the majority below as one wherein:

> ". . . money alone determines what issues are to be aired, and in what format, even assuming as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the

> intellectual content of the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising." [86]

Thus, mandating the sale of spot announcements for the individual expression of views on public issues, without the exercise of journalistic judgments by licensees as to the newsworthiness of the matters to be discussed, or consideration as to the adequacy of previous coverage and the appropriateness of particular spokesmen, will inevitably result in unfair and artificial exposure of some issues and some viewpoints.

An even greater threat to broadcasters' journalistic independence is the resultant intrusion of the FCC into day-to-day station and network operations. There can be no doubt that, from the initial setting of "reasonable regulatory guidelines" to implement the lower court's directive [87], the Commission would increasingly be called upon to rule on such matters as (1) what issues are to be covered; (2) what viewpoints on given issues require more or less attention; (3) what persons or groups are to be allowed to express their views; (4) what viewpoints par-

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[86] App. 490-91. At present, because the licensee is cognizant that he may have to present opposing viewpoints free of charge, *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963), he is able to take this into account in planning coverage. However, under the right articulated by the court of appeals, the *Cullman* principle is invoked at the initiative of the spot advertiser. In this scheme, it is possible for the advertiser's financial resources to determine "what issues are to be aired", with the broadcaster required to make free time available to permit a fair presentation of the issues. See concurring statement of Commissioner Cox in *BEM*, App. 368. Finally, any suggestion that the *Cullman* principle or the fairness doctrine be suspended in these circumstances (see Commissioner Johnson dissent, App. 281) could result in the public being left uninformed.

[87] App. 488.

ticular groups or spokesmen actually represent; and (5) what, if any, time limit should apply. Disputes over the exercise of the newly articulated right will be inevitable and prolific, thrusting the Commission—and likely the courts as well—further and more profoundly into the area of program judgments of news and editorial material.[88]

Significantly, any refusal by a licensee to broadcast a given editorial announcement will generate the contention that such refusal constitutes an infringement of the applicant's right of free speech. Thus, irrespective of the manner and form of any resulting Commission "guidelines", the First Amendment ground on which the court of appeals decision is based presumably dictates that a reason be given for any licensee refusal. Thereupon, the Commission will be placed in the position of arbitrating the basis for any such refusal by measuring the licensee's reason for declining to broadcast certain announcements against the applicable guideline. As a consequence, the lower court decision will result in increased and undesirable government supervision of licensee day-to-day programming judgments.[89]

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[88] This would be directly counter to the Commission's long maintained policy of specifically avoiding any intrusion "in the news or editorial decision processes of licensees, because such intrusion by the government licensing agency might have a chilling effect on journalistic enterprise." *In re Fairness Complaint of Sidney Willens and Russell Millin*, 33 F.C.C. 2d 304, 309 (1972). See also *In re Mrs. J. R. Paul*, 26 F.C.C. 2d 591 (1969); *Letter to ABC, CBS and NBC*, 16 F.C.C. 2d 650 (1969); *New York City Health and Hospitals Corp.*, 32 F.C.C. 2d 299 (1971); *In re "The Selling of the Pentagon"*, 30 F.C.C. 2d 150, 152-53 (1971).

[89] Were the Commission to assume the responsibility to designate the issues or the spokesmen to be presented during broadcast advertising time, it would run a grave danger of violating the strictures of Section 326 of the Communications Act, 47 U.S.C. § 326. Like the refusal of Congress to require broadcasters to afford an individual right of access (see pp. 36-43, *supra.*), Section 326 reflects a firm Congressional intention to place the choice of programming in the hands of broadcast licensees. That section not only

In sum, such an intrusion on the broadcaster's ultimate responsibility to select and transmit program material [90] operates in a dual inhibitory fashion—it directly affects program judgments as to the material proffered by an "editorial advertiser" in a spot announcement context and indirectly influences programming decisions in other areas. A significant modification in one area of programming could well induce changes in other areas. For instance, assuming that the Constitutional basis for the lower court decision would not permit any rejections

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forbids any censorship of broadcast programming, but provides that the Commission should not set any regulations which would interfere with free speech in radio communication. Neither censorship in the classical sense—suppression of individual publications on the ground that their content is objectionable—nor establishment by the Commission of a scale of values which would govern the selection of individual programs was thought to be within the power conferred by this section. See 67 CONG. REC. 12356 (1926); SEN. REP. No. 772, 69th Cong., 1st Sess. 4 (1926).

[90] As we have shown, proceeding from the assumption that subjects to be covered and speakers to be heard must be determined by someone, a cardinal principle of broadcasting operations under the Communications Act has been that a licensee bears ultimate responsibility for all material broadcast over his facilities. See, *e.g.*, 47 U.S.C. § 310(b); *Pulitzer Pub. Co.* v. *FCC*, 94 F.2d 249, 251 (D.C. Cir. 1937); *Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900, 905-06 (10th Cir. 1947). The only exception to this general policy are broadcasts by candidates for public office where the licensee is forbidden to censor programming in which the candidate appears. 47 U.S.C. § 315(a). In a different sense, one legislative provision (47 U.S.C. § 315(a)) and two administrative regulations (the "personal attack" and "political editorializing" rules approved in *Red Lion*) circumscribe, in limited situations a licensee's responsive programming determinations. Thus, individuals subject to personal attacks have been designated the appropriate spokesmen for delivering replies and opposing political candidates have been predesignated as appropriate reply spokesmen to answer political editorials. In each instance, however, the licensee is initially responsible for the broadcast generating the reply obligation. Finally, while Section 315(a) requires that "equal opportunities" be extended opponents of a qualified candidate, the provision expressly states that "no obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate."

of proffered announcements on grounds of previous or intended coverage of the issues,[91] a heavy concentration of announcements on an issue such as the nation's economic health could cause a broadcaster seeking to maintain a semblance of balanced treatment to forego certain program selections in order to prepare and present material directly responsive to the repeated position expressed in the saturated announcement schedule.

A basic error of the court of appeals opinion—an error which bears directly upon the reasonableness of licensee discretion in determining whether to accept or to reject controversial issue announcements—is the assumption that time devoted to commercial announcements is merely a segment of the broadcast day "relinquished by broadcasters to others" and that it is not "closely controlled and edited by broadcasters", so that "all that is at issue is their decision as to which other parties will be given an opportunity to speak." [92] Elsewhere the court asserts that this is "an area in which editorial control over content has never been of major importance." [93]

This assumption is clearly erroneous. In screening commercial announcements for which broadcast time is sought, licensees exercise control over not only the "time, place and manner of speech" and other housekeeping functions referred to in the court's opinion,[94] but also substantive content. Thus, broadcast licensees, as part of their "public interest" performance, review proferred material to screen out false, misleading and deceptive

[91] The reasoning of the court of appeals clearly appears to suggest that it would be impermissible to refuse to sell advertising time on the ground that a similar viewpoint has already been adequately presented (App. 471-73) or on the ground that the matter is unimportant and that other issues are more deserving of coverage (App. 469).

[92] App. 464-65.

[93] App. 483.

[94] *Ibid.*

advertisements, libelous statements, promotions of lotteries and other illegal activities, obscene, profane and indecent expressions, and other forms of speech found objectionable or questionable under federal statute, state law, FCC and Federal Trade Commission policy, and industry and licensee standards of good practice and taste.[95] Licensees must also concern themselves with the "reliability and reputation of every prospective advertiser and . . . his ability to fulfill promises made to the public over the licensed facilities." [96]

The constitutional underpinning of the lower court decision, however, casts grave doubt on the question of whether the Commission or its licensees may develop substantive standards of these kinds to control the entry of editorial announcements, so as to prevent misleading, scandalous, indecent and "crackpot" statements on social or political issues.[97] The lower court recognized that a "discrimination against all controversial speech—such as we face in these cases—is somewhat less 'odious' than a discrimination among different controversial viewpoints on particular issues." [98] But the court ignored the fact

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[95] See *Center for Law and Social Policy*, 23 Pike and Fischer, Radio Regulation 187, 192-97 (1971); *Adoption of Standards Designed to Eliminate Deceptive Advertising From Television*, 23 Pike and Fischer, Radio Regulation 1550, 1560-65 (1971).

[96] *Center for Law and Social Policy, supra*, 23 Pike and Fischer, Radio Regulation at 193.

[97] The court of appeals itself relied upon the difference between "commercial" and "political" speech so far as the permissibility of content regulation is concerned (See, *e.g.*, App. 473 and n.38); but, as we have shown, it ignores the fact that broadcasters actually do regulate the subject matter of commercial announcements and may be called upon to act differently with respect to editorial announcements. For instance, in one of many ironies engendered by the court of appeals decision, the First Amendment ground of the opinion would presumably not permit a licensee to reject a brief 10-second announcement that is mere "sloganeering" on the basis that only a longer presentation on the complex issue would contribute to the public's right to be informed.

[98] App. 478.

that broadcasters will either have to make discriminatory judgments on the suitability of particular announcements for audiences of all ages and sensibilities, or permit what, in the eyes of the public generally, would be a clear debasement of the broadcast media by speech more appropriately expressed in other places.[99]

It is an unacceptable choice which should convincingly demonstrate that neither the First Amendment nor common sense compels a right of personal access for editorial announcements on all broadcast stations.[100] Indeed, the First Amendment interests of the public as a whole would be disserved by such a development. Rather than enhancing, it would be contrary to First Amendment interests, and a severe if not impossible administrative burden, if broadcasters were compelled to engage in the delicate balancing of constitutional and other interests concerning the acceptability of inflammatory, hateful,

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[99] A public place need be opened for First Amendment-protected expression only to the extent that the speech is presented "in a manner and for a purpose generally consonant with the use to which the property is actually put." *Amalgamated Food Employees Local Union 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-29 (1968).

[100] As we have shown, "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion, supra*, 395 U.S. at 386, 388. The court of appeals opinion recognizes no distinguishing characteristics of the broadcast media in this sense, and applies the strictest First Amendment tests, including the "clear and present danger" doctrine. App. 475. It is somewhat disconcerting that the lower court decision should end with a reference to *Terminiello* v. *Chicago*, 337 U.S. 1 (1949), if that is meant as an example of the kind of speech which must be broadcast in spot announcement form to citywide or nationwide captive audiences. The speech there in question, as detailed in Mr. Justice Jackson's dissenting opinion (337 U.S. at 13), involved an inflammatory anti-Semitic harrangue. Distinguishing features of that case are that the speech occurred at an auditorium at which sympathizers gathered inside and a disorderly protesting mob gathered outside; the majority of the Court held, in a 5-4 decision, that the situation could not justify conviction of the scheduled speaker for breach of the peace.

"frivolous" and other questionable expressions of opinion by all persons offering to pay for broadcast time.

As a "public trustee" the broadcast licensee has the obligation to select "appropriate spokesmen" to voice "significant" viewpoints on issues of "public importance". But, in implementing the kind of right of access proclaimed by the court of appeals, it is not likely that licensees would be permitted to limit access to "significant" views on important subjects. Ironically, the concept of licensee responsibility so fundamental to the system chosen by Congress and the Commission, and upheld by this Court in *Red Lion*, not only prompts the court below to find constitutional infirmities in the existing regulatory scheme,[101] but is the very component at least partially removed from the new constitutional scheme set in motion.[102]

As we have elsewhere shown, Congress, the Commission and the courts have determined that the central goal of the First Amendment as it applies to broadcasting is to enhance the right of the public to be informed. In these particular cases, the Commission, based on decades of experience in interpreting the statutory public interest standard and administering the fairness doctrine based thereon, carefully articulated the practical and legal basis for such policies and concluded that the pub-

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[101] According to the court of appeals, the present system is constitutionally inadequate because it allows broadcasters to "decide what issues are 'important,' how 'fully' to cover them, and the format, time and style of the coverage." (App. 469).

[102] For instance, the court found that the First Amendment interest in self-expression it had formulated could only be vindicated by putting the "crucial controls" for the use of some advertising time in the hands of outside individuals or groups. App. 468-69. Thus, even if broadcasters demonstrate a full exposition of viewpoints and partisan spokesmen during non-advertising time, "their retention of total initiative and editorial control is inimical to the First Amendment." App. 469. See also App. 485.

lic's interest in broadcasting would be best served by declining to compel stations to sell time for the presentation of individual views.[103] Moreover, as the administrative agency entrusted with the task of developing workable policies to govern the allocation and utilization of broadcast frequencies, the Commission is continuing to examine what further adjustments and changes are desirable or possible in fulfilling the spirit of the fairness doctrine.[104] Thus, if deficiencies in the public's First Amendment right to be informed are perceived, they can and should more appropriately be handled through administrative procedures before the Commission which look toward modifications in the existing system and take into account the full complement of related broadcast policies.

In contrast, the lower court's objective of removing from broadcast licensees and allocating to affluent individuals and groups discretion in some program content selection represents a glaring aberration of the total scheme of broadcast regulation. As we have seen, in a limited-time medium, the paramount right of the public to be informed cannot be meaningfully served by a common-carrier approach in which views and spokesmen are presented on a first-come, first-served basis. Accordingly, Congress and the Commission have determined to treat broadcast licensees as trustees for the public at large with the concomitant responsibility to select the issues and spokesmen to be broadcast. The lower court charts a dramatic departure in attempting to reformulate this system in a manner which diffuses responsibility for

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[103] App. 256-69; 366-68.

[104] See *In re Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 18859*, 23 F.C.C. 2d 27 (1970); *In re Notice of Inquiry in Docket No. 19260*, 30 F.C.C. 2d 26 (1971). The latter proceeding, which incorporates the former, is a comprehensive review of all aspects of the fairness doctrine and is intended to thoroughly explore, *inter alia*, the question of access generally to the broadcast media for the discussion of public issues.

program content to individuals and groups who bear neither a journalistic responsibility nor a statutory obligation to serve the public. Consequently, the new regime which is proposed would seriously compromise the vital First Amendment interests at stake by frustrating the ability of radio and television stations to program for the public at large and by leading to increased governmental supervision of broadcast speech.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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